

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS**

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MARILYN DAVIS,	*	No. 07-451V
	*	The Honorable Charles F. Lettow
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: July 11, 2012
	*	
SECRETARY OF HEALTH	*	attorneys' fees and costs,
AND HUMAN SERVICES,	*	reasonable number
	*	of hours for appellate litigation,
Respondent.	*	decision after remand

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Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for petitioner;  
Darryl R. Wishard, United States Dep't of Justice, Washington, DC, for respondent.

**PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS<sup>1</sup>**

This decision sets forth the basis for an earlier determination about the reasonable amount of attorneys' fees and costs for an appeal to the Federal Circuit. A March 20, 2012 decision found that Ms. Davis's appeal to the Federal Circuit

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<sup>1</sup> Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

lacked a reasonable basis, and alternatively, found if reasonable basis supported her appeal, then a reasonable amount of fees was \$27,606.65. In the relevant parts of a June 29, 2012 Opinion and Order, the Court of Federal Claims vacated the portion of the March 20, 2012 decision, concerning reasonable basis. In particular, the Court found that Ms. Davis's appeal was supported by reasonable basis. Thus, Ms. Davis was entitled to some award of attorneys' fees and costs. In regard to the amount of attorneys' fees and costs, the Court remanded the issue to me to explain how I determined the amount for the Federal Circuit appeal in the March 20, 2012 decision.

### **A. Attorneys' Fees**

The basic method for determining a reasonable amount of attorneys' fees is to use the lodestar method in which a reasonable hourly rate is multiplied by the reasonable number of hours. Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008).

In this case, the Secretary challenged the number of hours Ms. Davis spent on work relating to her Federal Circuit appeal.<sup>2</sup> The Secretary, particularly, disputed the amount of time spent in preparing the initial brief and the reply brief because those briefs repeated passages that Ms. Davis's attorneys had written previously. See Resp't Resp., filed Nov. 3, 2011, at 13-15.

To evaluate the reasonableness of work performed by Ms. Davis, I divided her appeal into stages. Within each stage, I determined the number of hours for which Ms. Davis sought an award and the total amount of fees for that stage. I considered whether the number of hours was reasonable and, in answering this question, I took into account the identity of the person performing the tasks. For example, an associate attorney, who charges a lower rate, might reasonably spend more time in drafting a brief than a senior attorney, who charges a higher hourly rate. I followed this process for each stage of the Federal Circuit appeal. Then, I added the reasonable amount for each stage to determine the total.

Preparation. The initial stage concerns work that occurred before Ms. Davis's attorneys began the substantive work on the initial brief. This period includes activities from September 8, 2012 through November 16, 2010. Ms.

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<sup>2</sup> The Secretary did not challenge the hourly rate requested for Ms. Davis's attorneys.

Davis's attorneys spent 5.9 hours in this process and requested compensation totaling \$1,241.10. I found all the activities were reasonable and credited Ms. Davis with \$1,241.10.

Initial Brief. The second stage involves work in drafting the initial brief. It begins on December 7, 2010, and continues through December 28, 2010. Ms. Davis's attorneys spent 55.7 hours and requested compensation totaling \$14,661.

The Secretary argued that Ms. Davis's attorneys largely drew upon earlier work in preparing Ms. Davis's initial brief. I reviewed Ms. Davis's reply brief, which was filed on November 17, 2011, to see whether Ms. Davis contested the Secretary's argument. She did not specifically respond to the assertion that the Federal Circuit briefs repeated sections of previous work. Despite the lack of reply from Ms. Davis, I independently reviewed Ms. Davis's Federal Circuit briefs and compared them to earlier briefs. "Earlier briefs" include the briefs filed in this case as well as the briefs Ms. Davis's attorneys wrote in the Moberly appeal.

Ms. Davis's initial Federal Circuit brief was 37 pages. The first 10 pages largely derive from the Federal Circuit brief filed in Moberly. There are some relatively minor changes, such as conforming the petitioner's name, vaccination, and condition. These alterations, however, could not have taken much time.

Pages 10-12 present the procedural history. This material is different, although the course of proceedings in Ms. Davis's case is not very involved.

Pages 12-16 contain the statement of facts. This section is a condensed version of the statement of facts in Ms. Davis's post-hearing brief, filed on October 29, 2009. Again, the changes, such as citations to the record, could not have taken much time.

Page 16 is the standard of review. This section comes from the Moberly brief. The "summary of the argument" on page 17 is similar to pages 36-38 of Ms. Davis's post-hearing brief.

As I mentioned in the March 20, 2012 decision, the most significant new section appears at pages 19-22 in which Ms. Davis argues that that "the Evidentiary Standard Imposed by [the Court] Was Not in Accordance with Law." This work counts as fresh work.

The remaining 15 pages (pages 22-37) present Ms. Davis's argument that she has fulfilled the Althen prongs. This section is largely repetitious. For example, the portion on Althen prong 1 is based upon the argument in Ms. Davis's April 15, 2010 motion for review, pages 2-8, and Ms. Davis's post-hearing brief, pages 7-16. There is a similar correspondence between the Federal Circuit brief on Althen prong 2 and pages 9-10 from the motion for review.

In sum, the new and important work of the attorneys is found in three pages. The remaining pages contain some alterations from previous briefs but they are not very significant. Under these circumstances, I estimated that a reasonable amount of time is 15 hours for a senior attorney (\$330) and 20 hours for an associate attorney (\$200).<sup>3</sup> I credited Ms. Davis with \$8,950.00.

Appendix. In the third stage, an associate attorney and a paralegal communicated with the Secretary's attorney. Although the substance of the communications is not always described, one entry indicates that the paralegal was preparing the appendix. Altogether, Ms. Davis sought compensation for 1.9 hours of work, totaling \$323.00. I credited this entire amount.

Reply Brief. The fourth stage of the appeal began on February 14, 2011, when the attorneys started working on the reply brief. This stage runs through February 28, 2011. The attorneys spent 51.7 hours in this phase and the request for attorneys' fees totals \$15,008.

In assessing the reasonableness of Ms. Davis's request for her reply brief, I followed the same process as I used for Ms. Davis's initial Federal Circuit brief. The critical question was the extent to which the reply brief repeated work from other briefs Ms. Davis's attorneys had drafted.

Ms. Davis's reply brief begins with an introduction and summary of her argument. These portions largely follow the "nature of the case" section and the "summary of the argument" section of the initial Federal Circuit brief.

Ms. Davis's reply brief contains a section called "The Respondent's-Appellee's Argument." This section, which spans about one page, is new work.

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<sup>3</sup> Two senior attorneys, Mr. Conway and Ms. Chin-Caplan, worked on Ms. Davis's Federal Circuit brief. Although Ms. Chin-Caplan's hourly rate is slightly less than Mr. Conway's hourly rate, I simplified the calculations by using Mr. Conway's hourly rate.

Section IV.A. of Ms. Davis's reply contains a mixture of some old work and some new work.

The argument in section IV.B.i.a. advancing "biological plausibility" presents new work. (It, however, still did not address Moberly). This section runs from pages 9-11. Another section of mostly new work is found at pages 13-17. In those pages (section IV.B.i.c.), Ms. Davis argued that she was held to an elevated standard of proof.

The remainder of the reply brief is mostly repetitious. For example, pages 21-24 of the reply brief --- which concerns Althen prong 2, Althen prong 3, and the lack of alternative cause --- come from pages 32-37 of the initial Federal Circuit brief.

In sum, there are fewer than ten pages of new argument. Under these circumstances, I found the request for 51.7 hours of work to be unreasonable. I estimated that a reasonable amount of time for a senior attorney (charging \$330 per hour) was 20 hours plus an additional 8 hours (charging \$200 per hour) for an associate attorney. Compared with the initial brief, I gave more hours to the senior attorney because the reply brief contained relatively more new material. I credited Ms. Davis with \$8,200.

Miscellaneous. In the fifth stage of the appeal, the attorneys and paralegals performed a variety of tasks between March 1, 2011 and April 27, 2011. The total amount of time was 13.7 hours and the total amount requested was \$3,319.10.

I found the amount requested to be slightly excessive. Many of the entries during this stage were vague, such as a "case meeting" without a description of what the discussion was about. Senior attorneys and junior attorneys conferred without any explanation of why two attorneys were reasonable. Thus, I reduced the amount award from \$3,319.10 to \$3,000.00.

Oral Argument. The sixth stage of the appeal largely concerns oral argument at the Federal Circuit and the immediate aftermath. This stage begins on May 2, 2011 and ends on May 16, 2011. The total amount of time requested was 18.2 hours and the amount was \$4,902.35. I credited the entire amount requested.

Ending. The seventh stage involves the attorneys work in concluding the case. From June 6, 2011 to July 12, 2011, the attorneys spent 3.4 hours and requested compensation totaling \$957.20. I credited the entire amount requested.

Summary.

	Stage	Requested	Awarded
1	Preparation	1,274.10	1,274.10
2	Initial Brief	14,661.00	8,950.00
3	Appendix	323.00	323.00
4	Reply Brief	15,008.00	8,200.00
5	Miscellaneous	3,319.10	3,000.00
6	Oral Argument	4,902.35	4,902.35
7	Ending	957.20	957.20
	TOTAL	40,444.75	27,606.65

For these reasons, I found that a reasonable amount of attorneys' fees for Ms. Davis's Federal Circuit appeal totaled \$27,606.65.

**B. Costs**

In the March 20, 2012 decision, I also found that Ms. Davis did not have a reasonable basis for incurring any costs. The Court, however, reversed this finding and found that Ms. Davis is entitled to costs associated with her Federal Circuit appeal.

The amount requested in costs was \$5,145.16. There is no dispute that these costs were reasonable for the appeal.

**Conclusion**

The Court's June 29, 2012 Opinion and Order required another decision, setting forth the basis for the determination regarding attorneys' fees and costs for the Federal Circuit appeal. For the reasons set forth above, a reasonable amount of attorneys' fees is \$27,606.65 and a reasonable amount of costs is \$5,145.16. **A check shall be made jointly payable to Ms. Davis and her law firm in the amount of \$32,751.81.**

Pursuant to Vaccine Rule 28.1, the Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed.<sup>4</sup> The Clerk's Office is also instructed to provide this decision to the assigned judge.

IT IS SO ORDERED.

s/Christian J. Moran  
Special Master  
Christian J. Moran

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<sup>4</sup> This amount is in addition to the judgment entered on July 10, 2012.